Supreme Court, U.S.
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No. 95-851

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

Denise Chavez
Cross-Petitioner

v.

The University of Houston,
Arte Publico Press, & Nicholas Kanellos,
Cross-Respondents.

On Petition And Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the system of "notice pleading" set up by the federal rules as explained in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993), may a heightened pleading requirement be imposed in cases against individual government officials who assert qualified immunity as a defense?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 59 F.3d 539, and reprinted in Pet. App. A. The orders of the United States District Court for the Southern District of Texas are unreported and reprinted in Pet. App. B and C.

The court of appeals entered judgment on Aug. 1, 1995 and denied a timely petition for rehearing on Aug. 30, 1995.

The petition for writ of certiorari was docketed on Nov. 27, 1995. The conditional cross-petition was filed in reliance on Rule 12.5.

ADDITIONAL STATUTES INVOLVED

17 U.S.C. A. § 511(a) provides in part:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, . . . for a violation of any of the exclusive rights of a copyright owner. . . .

15 U.S.C. A.§ 1122(a) provides in part:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune,

> under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, . . . for a violation under this chapter.

28 U.S.C. A.§ 2072(b) provides:

> Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

ADDITIONAL RULE INVOLVED

Rule 9(a) of the Federal Rules of Civil Procedure provides in part: "It is not necessary to aver the capacity of a party to be sue or be sued ..., except to the extent required to show the jurisdiction of the court."

STATEMENT

The University of Houston is a public institution of higher education established by the State of Texas, and funded and operated in accordance with Texas law. Tex. Educ. Code Ann. § 111.01 et seq.; Appropriations Act 1989, 71st Leg., 1st C.S., Session Laws, Ch. 1263, p. 5624; Appropriations Act 1991, 72nd Leg. 1st C.S., Session Laws, Ch. 19, p.875; Appropriations Act 1993, 73rd Leg., Session Laws, Ch. 1051, p. 5161; Appropriations Act 1995, 74th Leg., Session Laws, Ch. 1063, p. 5554. Arte Publico Press is a constituent part of

the University operating under the auspices of and controlled by the University. Nicholas Kanellos, the individual whose conduct is at issue in Chavez' Conditional Cross-Application for Writ of Certiorari, is a state employee who acted on behalf of the Press, and therefore on behalf of the University. Kanellos is the official responsible for the operations of the Press including the negotiation and performance of the Publishing Agreement(s) in dispute. Kanellos in his official capacity, the Press and the University are legally indistinguishable, for which reason the Petitioners' Petition referred to them collectively as "the University."

The truly significant issue in this case is whether the Eleventh Amendment of the United States Constitution bars a suit against a Texas university, the University of Houston, for alleged violations of the Copyright and Lanham Acts. At the core of this issue is the question of Congress' power to abrogate a state's sovereign immunity affirmed under the Eleventh Amendment to the United States Constitution. It is this immunity that has been asserted to bar suit in federal court against the University itself, its academic press and the director of that press in his official, but not individual, capacity.

At the trial level, Kanellos asserted qualified immunity in his personal, as opposed to official, capacity. The procedural vehicle for this assertion was the Defendants Motion to Dismiss. The trial court denied this Motion. This decision was appealed to the U.S. Court of Appeals for the Fifth Circuit. The Fifth Circuit upheld Kanellos' claim of qualified immunity in his personal capacity. *Chavez v. Arte Publico Press,* 59 F. 3rd 539 (5th Cir. 1995).

BRIEF IN OPPOSITION TO CROSS-PETITIONER'S CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

The Cross Respondent, Nicholas Kanellos, is filing this Response to the Cross-Petitioner's Conditional Cross Petition for Writ of Certiorari in order to clarify issues raised in the Cross-Petitioner's Petition, which that petition addresses inadequately. In doing so, the Cross-Respondent recognizes certain of the Cross-Petitioner's propositions; to wit, 1) that this Court has reserved in the past the issue of the suitability of the heightened pleading rule in suits brought against state officials who may defend against liability in their personal capacity by an assertion of qualified immunity, 2) that this Court has granted certiorari on this issue in the past, and 3) that a certain amount of conflict exists among the circuits concerning the propriety of a heightened pleading standard. Nevertheless, there are certain matters which the Cross-petitioner wishes to point out to the Court which may bear in the Court's mind on the issuance of the Writ sought by the Cross-Petitioner. These include assertions (1) that only Kanellos has asserted qualified immunity to suit in federal court, (2) that qualified immunity has not been abolished by Congress as apparently asserted by the Cross-Petitioner, and (3) that *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* does not control the outcome of this case.

1. Kanellos has asserted qualified immunity; the University has not.

From the Cross-Petitioner's Cross-Petition, it is unclear against whom she seeks relief or the capacity in which relief is sought, although an inference may be possible that relief is ought only against Kanellos in his

personal capacity. The confusion stems from the fact that the only place in which the Cross-Petitioner has sought to identify against whom she seeks relief is in the caption on the cover, in which she identified the University of Houston and Arte Publico Press as Cross Respondents. It is the position of Kanellos, the University and Arte Publico Press that this is mistaken.

At the District Court the University, Arte Publico Press and Kanellos asserted their respective immunities. The University, the press and Kanellos in his official capacity asserted Eleventh Amendment immunity and the related unconstitutionality of certain Congressional enactments which purport to abolish that immunity. These are the issues which have been raised by the Petitioners in their Petition for Writ of Certiorari, to which issues the Cross-petitioner declined to file a response.

Likewise at the District Court, Kanellos asserted qualified immunity as a defense to liability in his personal capacity. This is an immunity that is not shared by the University or the press. This assertion was made in a joint Motion to Dismiss filed by all Defendants in the trial Court, but which clearly identified Kanellos as the moving party with respect to the claim of qualified immunity.

2. Congress has not abolished Kanellos qualified immunity.

The Cross-Petitioner argues that Congress has abolished all immunity for cases of copyright or trademark infringement. From the text of the pertinent statutes, as quoted at the outset of the Cross-Petition, this seems plausible. However, it must be realized that the ellipses in those quotations mask serious textual omissions. Those ellipses omit language limiting the

scope of Congress' abrogation of immunity. In fact. 15 U.S.C.A § 1122(a) and 17 U.S.C.A. § 511, the pertinent texts of which appears at the beginning of this Brief, on their face abolish only abolish eleventh amendment immunity and any other doctrine of sovereign immunity which might be asserted in defense.

Qualified immunity falls outside the scope of both eleventh amendment immunity and sovereign immunity. In the simplest terms Eleventh Amendment immunity and sovereign immunity protect the State - and in particular its Treasury- *See e.g., Hess v. Port Authority Trans-Hudson Corporation*, 115 S.Ct. 394, 404 (1994) and cases cited therein. Qualified immunity by contrast protects the official - and his or her personal fortune - from exposure to suit and liability. *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982)

3. This case is not controlled by *Leatherman*.

The Cross Petitioner approaches this case simply as one controlled by *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993). Indeed, some of the cases from the Seventh Circuit cited by the Cross-Petitioner appear to conclude that *Leatherman* abolished any heightened pleading rule attendant to qualified immunity. *See, e.g., Baxter v. Vigo County School Corp.*, 26 F.3d 728,734; (7th Cir. 1994); *Palmer v. Board of Education*, 46 F.3d 682,688 (7th Cir. 1995). Nevertheless, other circuits have recognized that Leatherman concerned the "applicability of a heightened pleading standard to §1983 actions alleging municipal liability" *Leatherman, supra*, at 1161 and that the Court in *Leatherman* expressly refused to consider the issue of whether the Court's "qualified immunity jurisprudence would require a heightened pleading in cases involving

individual government officials, *Leatherman*, *supra*, at 1162.

Kanellos would assert that this Court's qualified immunity jurisprudence amply distinguishes this case from *Leatherman*. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982), this Court established that qualified immunity rests on the objective reasonableness of an official's conduct as measured by reference to clearly established law. As established in *Harlow*, this objective qualified immunity standard permits the defeat of insubstantial claims without resort to trial. By analogy to *Harlow*, Cross-Petitioner needed to show that Kanellos conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818, 102 S.Ct. at 2738. This standard has been further tightened in *Mitchell v. Forsyth*, 472 U.S. 511, 526 105 S.Ct. 2806, 2815, (1985) in which this Court indicated that a defendant-official was immune from suit if the Plaintiff's allegations did not state a violation of clearly established law of which a reasonable person would have known. *Mitchell, supra* at 472 F.2d 511, 526. 105 S.Ct 2806, 2815

This standard has been given practical effect in the Fifth Circuit through the heightened pleading standard adopted in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir 1985) and applied herein. Therein the Court of Appeals held recognized that this Court had effectively made the negation of qualified immunity a prerequisite to proceeding in the District Court. Hence the Court required:

> In cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaint state with

> factual detail and particularity the basis for the claim which necessarily includes why the defendant official cannot successfully maintain the defense of immunity.

This format is not inimical to the Federal Rules of Civil Procedure, as might be contended by the Cross-Petitioner. Rule 9 clearly contemplates circumstances requiring more definite pleadings than are generally required by Rule 8. Rule 9(a) generally dispenses with any necessity to plead a party's capacity to be sued, but expressly limits this dispensation. The pertinent portions provide:

> It is not necessary to aver the capacity of a party to sue or be sued . . . except to the extent required to show the jurisdiction of the court.

Clearly, the Fifth Circuit's heightened pleading rule is in keeping with Rule 9(a) and its clear implication that the plaintiff must aver sufficiently the defendant's capacity to be sued to establish the jurisdiction of the court to hear the proceeding. As noted in the *Hammes* case cited by the Cross-Petitioner:

> Naturally, therefore, it [the Court] relies on the complaint to say enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that is not supposed to have the power to hear. *Hammes v. Aamco Transmissions, Incorporated,* 33 F.3d 774, 778. (ellipses not in original).

Alternatively, it would violate the Rules Enabling Act not to require such a heightened pleading. The Rules Enabling Act authorizes this Court to prescribe general

rules for the federal courts subject to the limitation that "such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.A. §2072(b) The defense of qualified immunity prohibits plaintiffs from exposing officials to the burdens associated with litigation, *Mitchell*, 472 U.S. at 526, *Harlow*, 457 U.S. at 813. For this reason Rule 8 would violate the Rules Enabling Act if it were simply applied in qualified immunity cases as it is in more routine matters.

CONCLUSION

Even if the petition is granted, the cross-petition should not be granted.

Respectfully submitted,

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